

# In the Missouri Court of Appeals WESTERN DISTRICT

JAS APARTMENTS, INC.,	)
APPELLANT,	)
V.	) ) WD71403
<b>v.</b>	OPINION FILED: NOVEMBER 9, 2010
MOHAMAD ALI NAJI, ET AL.,	)
RESPONDENT.	)

# APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY THE HONORABLE ROBERT MICHAEL SCHIEBER, JUDGE

Before Lisa White Hardwick, P.J., James M. Smart, Jr., and Alok Ahuja, JJ.

When the schedule B of a preliminary title commitment states that the spouse of the seller must join in the real estate transaction (to release the seller's spouse's marital interest), is a purchaser required to object in writing to that statement to avoid the spouse's marital interest being treated as a permitted exception to the purchaser's title? Although this case has a complex history, the foregoing question is, and always has been, what this case is about.

This is the second appeal of the litigation arising from this contract. In the first appeal, we reversed the initial determination of the trial court and remanded the case for

further proceedings. Now, due to the trial court's error of law in misinterpreting our first ruling, we again reverse the judgment of the trial court. We remand once again.

## Background

In November of 2002, Mohamad Ali Naji and his wife, residents of California, owned a 137-unit apartment building on Armour Boulevard in Kansas City. They had previously purchased the property as partners with others. They bought out the others. At that time, Mr. Naji's attorney caused the ownership of the property to be vested solely in the name of Mohamad Ali Naji ("Naji"). The property was subject to a deed of trust securing a loan with the remaining principal balance in 2002 of approximately \$500,000.

Naji engaged a broker to list the property, and the property was listed for more than a year. JAS, Inc., a Minnesota corporation, was looking for some property in the Kansas City area. JAS commenced negotiations through a broker working in its behalf, ultimately offering \$3.5 million with a \$350,000 carryback. The parties' brokers, apparently unassisted by legal counsel, used a standard form contract issued by the Kansas City Metropolitan Board of Realtors and added a few non-uniform provisions.

Without informing his wife before signing the agreement, Naji accepted the offer, signing as an individual, without any recitation of his marital status. He learned shortly thereafter that his wife did not want him to sell the property. Nevertheless, Naji fully intended to be bound by the contract.

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<sup>&</sup>lt;sup>1</sup> Though the Najis did not regularly reside in the building (because they resided in California), Mrs. Naji liked the building very much and liked the income the building produced. Her husband regarded the \$3.5 million offer as an exceptionally good offer in light of his previous efforts to market the property. She did not disagree that the contract price was a good price for the property. She just did not want him to sell it.

The contract provided for a closing date of February 11, 2003. The contract provided that Naji would convey marketable fee simple title subject only to "permitted exceptions" and furnish an owner's title policy insuring the same. Naji informed his broker that his wife did not want to sign any documents because she did not agree with his plan to sell the building. He promised, however, to continue trying to obtain her consent. He asked the broker to communicate his concerns to the buyer.

The contract required Naji to furnish JAS a preliminary title commitment within a specified period of time. The contract allowed JAS ten days to review the title commitment and to object in writing to any "matter" shown in the commitment.

Specifically, the contract (in paragraph 12) required that Naji deliver marketable title other than the exceptions which have become "permitted exceptions" pursuant to paragraph 8 of the contract:

Seller shall deliver and pay for an owner's ALTA title insurance policy insuring marketable fee simple title in Buyer in the amount of the purchase price as of the time and date of recordation of Seller's General Warranty Deed, subject only to the permitted exceptions defined below.... Buyer shall have ten (10) days after receipt of the Title Commitment ("the Review Period") in which to notify Seller in writing of any objections Buyer has to any matters shown or referred to in the Title Commitment. Any matters which are set forth in the Title Commitment and to which Buyer does not object within the Review Period shall be deemed to be permitted exceptions to the status of Seller's title (the "Permitted Exceptions"). With regard to items to which Buyer does object within the Review Period, Seller shall have until closing to cure the objections. If Seller does not cure the objections by closing, this contract shall automatically be terminated unless Buyer waives the objections on or before closing.

Naji secured a preliminary title commitment from the title company, Chicago Title, on January 8, 2003. The commitment provided that upon closing of the transaction

and the recording of the deed, "the form of which is satisfactory to [Chicago Title]," the policy "will be issued containing exceptions in Schedule B thereof to the following matters (unless the same are disposed of to the satisfaction of [Chicago Title])."

Chicago Title, like most other title companies, uses forms of commitment suggested by the American Land Title Association (ALTA). However, at the time of this transaction, unlike many other companies, Chicago Title was not using separate schedules: a schedule B-1 (listing the "requirements" for closing), and a schedule B-2 (listing the items that the title company anticipates excepting from coverage). Rather, Chicago Title listed *both* exceptions and requirements on one schedule B. The introductory paragraph of schedule B in this case stated as follows:

Upon payment of the full consideration to, or for the account of, the grantors or mortgagors, and recording of the deeds and/or mortgages, the form and execution of which is satisfactory to the Company, the policy or policies will be issued containing exceptions in Schedule B thereof to the following matters (unless the same are disposed of to the satisfaction of the Company). <sup>3</sup>

Schedule B of the commitment then set forth nineteen items. Pertinent to this appeal, item 15 stated:

The spouse, if any, of Mohamad Ali Naji must join in the proposed agreement.

JAS did not object in writing to *any* of the nineteen items in schedule B during the review period provided by the contract.

<sup>&</sup>lt;sup>2</sup> See, e.g., JOYCE D. PALOMAR, TITLE INSURANCE LAW, app. A at A-3 (ALTA Preliminary Commitment -- 2006) (West 2009).

<sup>&</sup>lt;sup>3</sup> The word "matters" appears in the introduction to schedule B in its efforts to refer to the exceptions listed there. *See, e.g.*, PALOMAR, app. A at A-3.

As the closing approached, Naji repeatedly sought his wife's consent to the transfer. Naji continued to hope to secure his wife's cooperation until late January 2003. In early February, Naji was in contact with the Chicago Title closing officer, Bonnie Vestal. He informed Ms. Vestal of his wife's determined unwillingness to agree to the transaction. He understood that JAS would not agree to close the transaction without the consent of his wife. Naji was concerned that the transaction would not close.

An attorney for JAS spoke with Ms. Vestal on February 7, four days before the proposed closing. They discussed the fact that Mrs. Naji was still refusing to sign or approve the transaction, and Ms. Vestal stated that the transaction "would not close" without Mrs. Naji's signature. On February 10, the day before the proposed closing, an attorney for JAS called Naji, who evidently was still not represented by legal counsel. Naji confirmed that his wife would not sign. The attorney threatened litigation if Naji could not secure his wife's consent. The next day, the attorney sent Naji a letter referring to the conversation, noting the damages that would result from a failure to close. Naji evidently did not respond.

JAS regarded the lack of consent from Mrs. Naji as a default by Naji. Instead of appearing at closing, JAS sought to enforce the contract in circuit court by legally extinguishing Mrs. Naji's interest.<sup>4</sup> JAS sought to accomplish this by obtaining a

<sup>&</sup>lt;sup>4</sup> In 1955, the General Assembly generally abolished inchoate dower. A spouse, however, has statutory rights provided by Chapter 474, such as the right of descent provided in 474.010. *See Reinheimer v. Rhedans*, 327 S.W.2d 823, 828 (Mo. 1959). Section 474.150 RSMo creates a presumption that a transfer of real estate is in fraud of marital rights if a person conveys real property without the formal consent of the spouse. Thus, if a husband owns property in his sole name, his ownership is subject to the statutory marital rights of his spouse. He can contract to sell the property without his wife's participation; but in order to fulfill his obligation to convey marketable title, his wife must join in the deed or otherwise file a formal consent to the release of her marital interest. Otherwise, the title is burdened by her potential marital interest until her death unless otherwise released or negated.

declaration that the transfer would *not* be in fraud of her marital rights and obtaining an order of specific performance. JAS's lawsuit asked the circuit court to declare an extinguishment of Mrs. Naji's interest so that Naji *could* convey marketable title and insure marketable title (because JAS anticipated that it would overcome the statutory presumption that the proposed sale would be a fraud against the marital rights of Mrs. Naji).

Naji, finally securing legal representation, countered with his own counterclaim for breach of contract for JAS's refusal to close as scheduled. Naji relied on the contract language, which said that any "matter" in the title commitment not objected to would become a "permitted exception." Naji's attorney pointed out that the contract gave JAS only a ten-day review period to object in writing to any "matter" affecting title shown on the title commitment. Naji argued that because JAS had not timely objected in writing to the title company's reference to the need for Mrs. Naji's participation, JAS had effectively agreed to take title subject to any potential marital interest of Mrs. Naji. JAS, he argued, had waived the right to object. Naji's position, in other words, was that JAS had defaulted by not closing, regardless of Mrs. Naji's lack of consent.

# **The First Trial Court Ruling**

After hearing evidence, the circuit court concluded that it was unable to grant specific performance and unable to extinguish Mrs. Naji's marital rights. The court said the claim was not ripe or justiciable, because Mrs. Naji had not yet asserted her claim of interest. The court also determined that JAS had not agreed to take title subject to Mrs. Naji's interest. Accordingly, the court said, Naji's inability to secure Mrs. Naji's consent

to the agreement rendered Naji unable to deliver marketable title. The trial court found that because Naji could not cure the impending title defect, the contract terminated. The court denied relief to both parties. The court said, in effect, that neither Naji nor JAS were in default. Both parties appealed.

## The First Appeal

In the first appeal, this court, after reviewing the factual background, addressed the trial court determination that the contract terminated under its own terms. *JAS*Apartments, Inc. v. Naji, 230 S.W.3d 354, 358 (Mo. App. 2007). This court disagreed with the trial court's analysis, holding that the contract had not self-terminated. *Id.* at 359. This court noted that the contract would self-terminate only in the event of two things: first, there must have been some impending title defect in schedule B to which *JAS was required to object in writing* if it did not wish to take title subject to the defect; and secondly, Naji must have failed in being able to resolve the objection. Id. at 358. Thus, "[t]he contract remained in force, and the parties were obligated to perform their duties under it." Id.6

The court did note, however, that it could not say, based on the record it had, whether Chicago Title had intended Mrs. Naji's participation in the transaction as an "exception" as opposed to a "requirement" for issuance of the insurance policy. The

<sup>5</sup> In fact, even the occurrence of these conditions did not self-terminate the contract but instead afforded JAS the right to declare the contract terminated, or in the alternative, to elect to waive the uncured objection and to close receiving title subject to the uncured objection.

<sup>&</sup>lt;sup>6</sup> The trial court had reached a very practical result, if not a technically accurate result, in determining that the contract terminated "by its own terms." The court recognized that Naji could not convey marketable title. Because JAS did not wish to declare the contract breached and walk away with a refund of its down payment, the trial court's solution was not acceptable to JAS. JAS wanted to acquire the property, and JAS had the right to bring its legal action to seek specific performance and to cancel Mrs. Naji's marital interest.

court noted that the location of the item (in a schedule that purported to be listing "exceptions") indicated one thing, while the wording of the item (specifying that Mrs. Naji "must" sign) indicated the opposite, creating an ambiguity. *Id.* at 362. This court said that if "Chicago Title intended for the provision to be a requirement for issuance of a policy insuring the property's title..., the circuit court may well deem Naji to be in breach of contract for failing to perform his obligations to cause Chicago Title to issue a policy insuring the property's title." *Id.* at 358 n.3.

This court's reasoning was grounded in an understanding of how title insurance functions in a conveyance. In preparing to issue a title commitment, a title company typically examines the matters of record that affect the title of the seller. The title company's research will discover matters affecting title, including, for instance, the restrictions, the easements, any recorded leases, and the various possible types of liens. The title company will consider many of the the items discovered to be "exceptions," or "clouds on title" that the title company plans to exclude from title coverage unless the exception is resolved to the title company's satisfaction. Typically, exceptions are simply listed, without an accompanying instruction or direction. As previously noted, exceptions are usually itemized on schedule B-2 of a title commitment. There are other items commonly identified in a title commitment as "requirements." Requirements are directions or instructions that must be completed as a condition of the title company's willingness to issue a title policy insuring marketable title in the buyer. Typically, requirements are written as a direction, and instruct a specific action that must be taken. As previously noted, requirements are usually itemized on a schedule B-1. Here, because

Chicago Title's title commitment combined exceptions and requirements, further evidence was required to determine whether item 15 addressing Mrs. Naji's consent to the transaction would have typically appeared on a schedule B-1 as a requirement, or on a schedule B-2 as an exception.

This court, therefore, expressly remanded "for the circuit court to consider whether or not Naji breached the agreement and, if so, what the appropriate remedy should be." *Id.* at 359.<sup>7</sup> On this subject, the court noted that, contrary to the circuit court, it found evidence that could support a finding that Naji anticipatorily repudiated the contract. *Id.* at 362. Though the court acknowledged that the contract did not require Mrs. Naji to join in the transaction, the contract did require Naji to provide JAS a title policy "insuring marketable fee simple title subject to any exceptions in the title insurance to which JAS ... did not object." *Id.* This conclusion returned the court to its earlier observation that the trial court needed to determine whether the directive that Mrs. Naji join in the transaction was a "requirement" (in which case JAS did not need to timely object and Naji would be in anticipatory breach of the contract given his indication that Mrs. Naji would not consent to the transaction) or an "exception" (in which case JAS

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<sup>&</sup>lt;sup>7</sup> This court also granted JAS's point that the issue of whether Naji's sale of the property without his wife's consent would be in fraud of marital rights was ripe for adjudication and that JAS had standing to pursue a declaratory judgment. *Naji*, 230 S.W.3d at 360. The court held that JAS would not otherwise have an adequate remedy at law. *Id.* This court noted that specific performance of the contract could be awarded even without Mrs. Naji's participation, citing *Wilkinson v. Vaughn*, 419 S.W.2d 1 (Mo. 1967), as long as the statutory presumption of fraud is found to be inapplicable. *Id.* at 362. This court specified that "upon remand, if the circuit court should determine that Naji's conveyance of the property did not [*i.e.*, would not] defraud his wife of her marital interests in the property, [the court] is free to order specific performance." *Id.* 

<sup>&</sup>lt;sup>8</sup> It is obvious that the phrase "join in the agreement," in practical terms, would mean "consent and formally agree to the transaction." This might be evidenced by joining in the *deed* or by a separately executed consent to the conveyance and a release of her interest. Or it could have meant join "in the *contract*," which would have obligated Mrs. Naji to release her marital interest in some fashion. The point was that Mrs. Naji needed to release her marital interest.

waived any claim of breach by failing to timely object to the title defect and JAS would be in breach of the contract for refusing to close). *Id.* This court said:

Resolution of the issue depends on the circuit court's factual finding of whether or not the title insurer intended the title insurance commitment to require [Mrs.] Naji's joining in the contract or whether or not [Mrs.] Naji's joining in the contract was an exception to the promised title insurance. Upon remand, the circuit court will resolve this issue.

*Id.* (emphasis added).

Logically, the remanded issue represented the key to resolving the question of breach.<sup>9</sup>

### **Remand Hearing**

In accordance with the mandate, the parties on remand introduced more testimony and evidence as to the "exception versus requirement" issue. At the hearing conducted on remand, the court considered testimony from the key witnesses who had testified earlier before a different judge in the first trial. Included among the witnesses were Mr. John T. Coghlan and Ms. Kellee Dunn-Walters, who testified in the first trial as title insurance experts. In addition, however, the court also heard testimony for the first time from Stephen M. Todd, who had served thirty-three years as Regional Counsel for Chicago Title and was so serving at the time of the pertinent events in 2003 (and continued until his retirement in 2006). Mr. Todd has served as Chair of the Missouri Bar Property Law Committee, has authored the Missouri Foreclosure Manual, and has written the Missouri

<sup>&</sup>lt;sup>9</sup> Although the parties' contract required JAS to object to any "matter" shown in the commitment with which it objected, or to be content to accept that "matter" as a permitted exception, and although "matter" was not defined in terms of either "requirements" or "exceptions," the court necessarily concluded that "matter" meant "exceptions," and not "requirements." As we discuss in greater detail *infra*, the construction of "matter" to mean "exceptions" and not "requirements" is grounded in common sense and in the common practice and understanding in the real estate industry.

Handbook on Title Insurance. *See* Todd, Missouri Foreclosure Manual, 38 MISSOURI PRACTICE SERIES (2009-2010 ed.); and I Mo. REAL ESTATE PRACTICE Chapter 2, Title Insurance (MoBar 4th ed. 2000).

Mr. Todd's testimony closely paralleled that previously given by Mr. Coghlan but also provided significant additional information. Mr. Todd explained the background as to schedule B and presented testimony not only as to "requirements" and "exceptions" but also as to custom and practice in the title insurance industry.

Mr. Coghlan also had substantial experience, having previously worked a combined eighteen years for Chicago Title and Stewart Title. Currently, as a practitioner, he represents the Missouri Title Insurance Association (affiliated with ALTA) and title companies in his law practice.

Ms. Dunn-Walters had worked for Chicago Title since 2000. She had several years of previous experience as a title examiner (for Asbury Title) and had since served as an underwriting counsel and commercial manager with Chicago Title.

## The Ruling after Remand

After hearing the evidence, the trial court on remand<sup>10</sup> stated:

According to the court of appeals, this decision [as to the issue of whether Naji breached the contract] is dependent upon the factual finding whether following closing of the sale, Mr. Naji could have obtained from Chicago Title and provided to JAS Apartments an [ALTA] policy of title insurance that would insure the title conveyed to JAS Apartments with an exception for the marital interest of [Mrs.] Naji.

The evidence presented and testimony of the witnesses at trial on this point was undisputed. *Regardless of whether item 15 found in* 

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<sup>&</sup>lt;sup>10</sup> The case was reassigned to the Hon. Robert Schieber after the recusal of the Hon. Edith Messina.

schedule B of the title commitment is characterized as an exception or requirement, Chicago Title could reword item 15, and Mrs. Naji's marital interest would become an exception to the coverage provided under the title insurance policy.

The trial court noted that the expert witnesses for both sides had agreed that item 15 "could be converted into an exception that would carry over to the title policy."

(Emphasis added.) The trial court thus found that:

Mrs. Naji's joining in the agreement was *not a requirement* imposed by Chicago Title for issuance of a title insurance policy. It was an exception to the coverage and, therefore, Mr. Naji did not anticipatorily repudiate the contract because [Mrs. Naji's] refusal did not thwart him from fulfilling his obligation to provide title insurance.

The trial court then found that JAS, under the contract documents, "had agreed to take whatever quality of title Naji could convey, subject to JAS's right to object in writing to any title defects." The court concluded that because JAS failed to timely object in writing to item 15, JAS had waived its right to receive marketable title. The court found that JAS had breached the contract when it failed to close the transaction as scheduled. The court also awarded attorneys' fees to Naji under the contractual provision related to attorneys' fees.

## The Current Appeal

JAS now appeals the circuit court's determination that item 15 in schedule B of the title commitment was an *exception* to coverage rather than a requirement to be fulfilled before a policy would be issued. JAS contends that the trial court erred in entering judgment in favor of Naji pursuant to that ruling. JAS asserts that the evidence at trial on remand established that Chicago Title would not issue title insurance or close the

transaction unless that item was satisfied. JAS also argues that the trial court accordingly erred in its ruling that Mr. Naji did not anticipatorily repudiate the contract.

#### **Standard of Review**

The argument of JAS is that the judgment is erroneous as a matter of law, because the essential facts are not disputed and it is only the legal interpretation of the facts that is at issue in this case. JAS is essentially arguing that the trial court misapplied the law. JAS also says that the trial court's error in discerning the legal effect of the contract language and the language of the title commitment is "so conspicuous," in light of the evidence, that reversal is compelled even on the basis that the judgment is not supported by substantial evidence.

Respondent Naji disagrees, contending that the issue of whether item 15 in schedule B was a requirement or an exception was simply a factual determination for the trial court. Naji reminds us that we defer to the trial court in factual determinations.

Regardless of whether the issue is primarily a legal issue or a factual issue, we review this case under the rule of *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). *See also* Rule 84.13(d). Under that rule, we will affirm the decision unless the trial court misapplied or erroneously declared the law, or the judgment is not supported by substantial evidence, or the judgment is against the weight of the evidence. *Murphy*, 536 S.W.2d at 32. Thus, if the issue is one of law, we review *de novo* to see if the trial court misapplied the law. *Id.* If the issue to be decided is one of fact, we determine whether the judgment is supported by substantial evidence and whether the judgment is against the weight of the evidence. *Id.* "Appellate courts should exercise the power to

set aside a decree or judgment on the ground that it is 'against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong." *Id*.

## The Trial Court Erroneously Construed the Opinion and Our Mandate in Naji I

It is clear from the above referenced conclusions of the trial court that the trial court erroneously interpreted the language of our opinion in Naji I and our resulting mandate. The trial court heard the testimony of the expert witnesses but apparently thought much of it was irrelevant, because in the court's mind, under our mandate, it did not matter whether item 15 was intended to be an exception or a requirement as long as Chicago Title was willing to issue a policy one way or another. This was not the directive of our remand. While it is true that the experts who testified on remand all agreed that item 15 "could be converted into an exception that would carry over to the title policy," that fact entirely missed the point of the remand. The question the trial court was to have answered on remand was: what was item 15 during the contract's ten-day review period -- requirement or exception? If JAS, by failing to timely object to an exception within the ten-day review period, is thereby deemed to have waived all objection to the defect represented in that exception, then JAS, as buyer, was obligated to proceed to closing and to accept a title encumbered by that defect, with no title policy protection as to any such defect. If, on the other hand, the burden was on Naji, as seller, to address a requirement to the satisfaction of the title company so that a title policy would be issued insuring marketable title, and if Naji did not do so, then Naji, as seller, breached the contract. That would mean that JAS had properly sought a legal remedy to enforce the contract.

The trial court's ruling was not responsive to the question posed in *Naji I*. The trial court thus misapplied the law as well as misinterpreted our mandate in *Naji I*. We must, therefore, reverse the trial court's judgment.

That does not end our inquiry, however. We review the evidence presented on remand to determine whether the question *Naji I* expressly requested the court to address -- whether item 15 was intended as a requirement or an exception in the initial title commitment -- was unequivocally answered so as to avoid the need to remand, once again, to resolve the same unanswered question.

### The Specific Evidence on Remand

Mr. Todd, who first testified in this matter on remand, explained why the introductory remarks to schedule B in this case referred only to "exceptions" when in fact the schedule typically included *both* requirements and exceptions. Mr. Todd explained that based on circumstances and experiences unrelated to this case, Chicago Title made the decision that its title commitments would include *both* the requirements and the exceptions in a single schedule B rather than in a separate schedule B-1 and schedule B-2. He said that typically the exceptions were listed first, with some generally using straight "boilerplate" language. He said that applicable requirements were usually stated later.

Mr. Todd and Mr. Coghlan testified that item 15 (which provided that if the seller is a married man, his spouse must join in the transfer) is a requirement. They said that without the joinder of the spouse, the title company would not have been willing to issue

a title policy insuring marketable title. Their testimony on this point was clear and unequivocal. For example, Stephen Todd testified as follows:

Q: Item No. 15, can you tell us what that is?

A: That's the requirement that if the seller is a married person that his spouse must join in the document transfer.

Q: That's very standard language of Chicago Title?

A: Yes.

John Coghlan similarly testified, as follows:

Q: With ... many years of experience in the industry, is [Item 15] ambiguous in any way to you? In other words, as to whether this is a requirement or an exception?

A: It's not ambiguous to me, no.

Q: What is it?

A: It's a requirement.

Q: It's not an exception?

A: No, it's not.

According to Ms. Kellee Dunn-Walters, a "requirement" is something that must be done in order for a policy to issue (such as the payment of the premium for the policy, or the furnishing by a corporation of its articles of incorporation). Certainly, the statement "the spouse, if any, of Mohamad Ali Naji must join in the proposed agreement" would be a requirement under Ms. Dunn-Walters's definition. Ms. Dunn-Walters further testified that an "exception" is something that is listed as an exception in schedule B, which will end up being listed on the title policy as an exception to coverage. Here, everything,

requirements and exceptions, were listed on schedule B, rendering Ms. Dunn-Walters's definition singularly unhelpful in resolving the ambiguity in the schedule we identified in *Naji I*.

With regard to item 15 (the spousal signature requirement) in the title commitment, Ms. Dunn-Walters said that "it is an exception ... we don't title it as a requirement because we are not saying it is a requirement." This testimony appears to simply state that because item 15 appeared on a schedule that included a "prefatory paragraph" mentioning exceptions, then everything listed on the schedule was an exception. Our supposition is confirmed by later testimony, where Ms. Dunn-Walters, when asked "[y]ou believe [item] 15 is an exception," responded, "[w]ithin the context of paragraph B [i.e., schedule B] it is an exception." Ms. Dunn-Walters's testimony disregards the uncontested evidence that the practice of Chicago Title at the time was to list exceptions and requirements on the same schedule B. Further, Ms. Dunn-Walters's testimony is completely inconsistent with the fact that we concluded in Naji I that schedule B was ambiguous because one could not simply draw the conclusion that all items listed thereon were intended to be "exceptions."

Ms. Dunn-Walters was not aware of any title commitments ever issued by Chicago Title in which the marital interest was listed as an exception, instead of as a requirement. Moreover, Ms. Dunn-Walters specifically testified that in order for Chicago Title to have issued a title policy in this case with Mrs. Naji's marital interest identified as an exception, the company would have required "written consent" from JAS. In this respect, Ms. Dunn-Walters's testimony was consistent with the testimony of Mr. Todd

and Mr. Coghlan that the spousal consent item on this schedule B was a requirement and that converting the item into an exception would have required further negotiation and agreement of the parties.

There was also the testimony of the closing officer, Bonnie Vestal, who spoke to the attorney for JAS, as buyer, on February 7, 2003. Mrs. Vestal said to JAS what was common sense and clear to her from her experience and the wording of the title commitment: the transaction "would not close without Mrs. Naji's signature," a statement that reflects Chicago Title's intent that Mrs. Naji's signature was a requirement that had to be satisfied before it would agree to issue a title policy. Consistent with this, Ms. Vestal said in her testimony that exceptions are stated in the commitment in passive language, while requirements may direct an action, as the command in this case (*e.g.*, "the spouse ... must join"). Ms. Vestal, a twenty-five year closing officer, most certainly had familiarity with the way requirements and exceptions are stated on Chicago Title commitments.

We conclude that the responsive and uncontested evidence presented to the trial court on remand was that item 15 was a requirement at the time the title commitment was issued and, thus, during the review period. Our conclusion is bolstered by common sense. One would not expect a buyer to "object" in writing to a stated requirement in a title policy that directs performance of an act that will benefit the buyer. Unlike an "exception" to coverage, which a buyer can either elect to "live with" or "object to," a "requirement" that inures to the buyer's benefit is not a "matter" that any seller under a real estate contract could reasonably expect a buyer to object to, such that a failure to

"object" would permit non-performance of the requirement. Mr. Coghlan so testified.

He stated that item 15 in this schedule B was an item for the seller to attend to, not for the buyer to object to. Even Ms. Dunn-Walters agreed. When asked if she could think of "any reason" a buyer would object to the title company specifying that a spouse "must join" in the conveyance, she could not, on her own, think of any reason.

Our conclusion is also bolstered by industry custom and recognized practice. A "requirement" in a title commitment is recognized as a direction by the title company to be met, "failing which no title insurance will be issued," while "'exceptions' ... do not preclude issuance of title insurance, but are disclosed as clouds on the title." *Psaromatis v. English Holdings I, L.L.C.*, 944 A.2d 472, 482 n.11 (D.C. 2008). Clearly, given this industry understanding, item 15 was a requirement. Otherwise, Mrs. Vestal would not have advised JAS's attorney that Naji's failure to perform the "requirement" would mean no closing.

We find that item 15 was a requirement in the initial title commitment and, thus, during JAS's review period under the contract. Because Naji did not perform the requirement, Chicago Title would not agree to issue the title policy *insuring marketable title* as Naji was contractually obligated to provide JAS. Because Naji could not get Mrs. Naji to consent to the transaction, he could not convey marketable title to JAS. By advising, just before closing, that he would be unable to secure Mrs. Naji's participation in the transaction, Naji anticipatorily breached the contract. It matters not that Chicago Title could have "reframed" item 15 as an exception, as the circumstance which would

have permitted Chicago Title to do so, JAS's agreement to modify the contract with Naji and to accept title to the property subject to Mrs. Naji's marital interest, never occurred.

Naji says that the trial court on remand reached its decision pursuant to "the law of the case" and that we cannot veer away from that interpretation of our mandate. Naji points out that a "previous holding in a case constitutes the law of the case and precludes relitigation of the issue on remand and subsequent appeal." *Walton v. City of Berkeley*, 223 S.W.3d 126, 128-29 (Mo. banc 2007). We agree. But the law of the case was our holding that schedule B was ambiguous and that the trial court on remand needed to determine whether item 15 was a requirement or an exception in the title commitment initially issued. The trial court did not reach a decision that was responsive to the law of the case.

Even if Naji and the trial court were confused by the fact that this court referred to the issue of whether Chicago Title would have issued a "policy of title insurance," and failed to modify those words with the clarifying phrase "insuring marketable title," we would think that our concern about the nature of item 15, clearly expressed at other points in the opinion, would have been a tipoff that what this court really wanted to know was whether JAS had a duty to object to item 15 in order to preserve the right to receive title to the property that was not subject to Mrs. Naji's marital interest.

In any event, we have discretion to make exceptions to the law of the case where there is significant new evidence presented on remand. *See Norris v. Bristow*, 236 S.W.2d 316, 319 (Mo. 1951) (adjudication of questions presented in a prior appeal constitutes the law of the case "unless there is a substantial difference in the evidence and

the facts upon the two trials"). In this case, the substantial difference in the evidence was presented in the form of the testimony of Mr. Todd, who explained, *inter alia*, the functioning of schedule B, the historical reasons for that functioning, and that the requirement/exception distinction can be discerned by straightforward common sense. If Mr. Todd's testimony had been available to this court on the first appeal to inform the court more fully as to the practices of Chicago Title at that time, we believe this litigation would have been resolved by a holding that item 15 was a requirement to which JAS had no obligation to object.

#### Remand

We conclude that Naji breached the contract with JAS. Upon Naji's anticipatory repudiation of the contract, JAS could have declared the contract canceled due to Naji's inability to convey marketable title and could have recovered its earnest money and walked away. JAS, however, also had the right to pursue litigation to gain marketable title through cancellation of the claim of marital interest and specific performance of the contract or damages. Although this litigation has, sadly, already gorged itself to an unseemly degree on the resources of these parties, we must remand again so the trial court can determine the appropriate remedy for Naji's breach of contract.

We are aware that JAS seeks the equitable remedy of specific performance. We are also aware, however, that significant time has passed since the parties' contract was set to close. Naji also presumably still asserts an entitlement to reimbursement, should specific performance be awarded, to compensate for alleged improvements to the property during the pendency of this litigation. Further, there remains to be resolved the

question of whether specific performance is even available in view of the lapse of time and change of circumstances. JAS established through clear evidence presented in the initial hearing that a transfer by Naji would not constitute a fraud on Mrs. Naji's marital interest; thus, we declare as a matter of law that her claim of marital interest is extinguished and need not further be litigated.<sup>11</sup>

It may be that for other reasons the equitable remedy of specific performance no longer remains an appropriate remedy. Should the trial court on remand so determine, an award of damages to JAS would presumably be appropriate. "Where the vendor cannot convey the property contracted to be sold because of a lack of marketable title to it, it is generally recognized that the purchaser may recover damages for the breach, measured by the difference between so much of the contract price as is unpaid and the market price of the land." 25 *Williston on Contracts* section 66:82 (4th ed.). Some authorities do suggest that this measure of damages is not appropriate in the absence of fraud on the part of the vendor. *Id.* However.

any rule that the purchaser cannot recover for the loss of bargain due to the vendor's inability to convey marketable title where the vendor acted in good faith in entering into the contract has been regarded as inapplicable where the reason for the vendor's breach is the refusal of his or her spouse to join in the conveyance, on the theory that a breach of this sort constitutes such fraud on the part of the vendor as to entitle the purchaser to compensation for the loss of the bargain.

*Id.* (emphasis added).

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<sup>&</sup>lt;sup>11</sup> A transfer may be found "fraudulent" when the transfer was executed with the purpose of defeating the non-transferring spouse's marital rights. *See, e.g., McDonald v. McDonald*, 814 S.W.2d 939, 945 (Mo. App. 1991). In the 2005 trial, both Mr. and Mrs. Naji testified that there was no intent to defeat Mrs. Naji's rights and that the price for the property was a good price. Mrs. Naji acknowledged that her husband "would never do something like that [*i.e.*, try to defeat her marital rights]."

Our Supreme Court faced a similar set of circumstances in *Bobst v. Sons*, 252 S.W.2d 303 (Mo. 1952). In *Bobst*, the husband entered into a contract to sell property he owned as tenants by the entirety with his wife. *Id.* at 304. Wife refused to agree to the transaction. *Id.* The Supreme Court held that "[i]t is not unlawful for a person to contract to sell and convey something he does not own but expects to acquire, and, if he unqualifiedly undertakes to do that which later he finds he cannot perform, he should suffer the liability the law imposes upon the contract breaker." *Id.* at 305. The Supreme Court remanded the case to determine damages. *Id.* Observing that specific performance was being sought by the buyer, the court noted that

[t]he rule generally followed in specific performance cases is that if specific performance cannot be ordered because of a disability due to a defect in the vendor's title existing at the time of entering into the contract, or other similar reason, ... then, although the Court cannot grant a specific performance, it will retain the cause, assess the plaintiff's damages, and decree a pecuniary judgment in place of the purely equitable relief originally demanded.

*Id.* at 305-06. The trial court will, thus, have the power to assess whether specific performance remains an appropriate remedy, and if not, to award JAS compensatory relief.

Whatever remedies the trial court fashions on remand will also require consideration of JAS's claim for attorneys' fees. If the court determines that fees are to be awarded JAS for Naji's breach of contract, the trial court must consider all of the pertinent facts and circumstances, as the contract specifies. These circumstances should include the confusion introduced into the case by factors such as the fact that Chicago Title's schedule B was ambiguous because it included both requirements and exceptions.

The court might also wish to consider why Naji, who supposedly stood ready to close and was very happy with the purchase price, has so strenuously litigated against JAS's efforts to nullify any claim of marital interest so as to permit him to complete the transaction.

## Conclusion

The judgment of the trial court is vacated, and the case is remanded to the trial court for further proceedings in accordance with this opinion.

James M. Sma	art, Jr., Judge	

All concur.